

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 6323 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

=====

1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements? YES
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO
2 to 5 NO

MAFATLAL SWARUPCHAND THAKKAR

Versus

STATE OF GUJARAT

Appearance:

MR DK ACHARYA for Petitioner
MR KP RAVAL, APP for Respondent No. 1
MR ASHISH H SHAH for Respondent No. 2

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 14/12/1999

ORAL JUDGEMENT

1. Heard learned Advocate Mr. D.K.Acharya, on
behalf of applicant, learned APP Mr. K.P. Raval on
behalf of Respondent No.1 State and learned Advocate Mr.
R.C. Shah, on behalf of Respondent No.2. RULE. Learned

APP Mr. K.P. Raval waives service of rule on behalf of respondent No.1 and learned Advocate Mr. R.C.Shah, waives service of rule on behalf of respondent No.2. Learned advocates appearing for the parties agree to hear this matter finally.

2. The facts leading to the controversy is a criminal complaint filed by Hardik Vinodchandra Gandhi, respondent No.2 here, in the capacity of proprietor of Dhanlaxmi Finance at Ahmedabad. The complaint was filed before the Metropolitan Magistrate, Ahmedabad, Court No.16, being Criminal Case No. 1541 of 1996 against (1) Sureshkumar Mafatlal Thakkar and (2) Mafatlal Swarupchand Thakkar. Accused No.2 - Mafatlal Swarupchand Thakkar is the applicant here and accused No.1 - Sureshkumar Mafatlal Thakkar is not the applicant or a party to this petition. As per the allegation in the complaint, both the accused i.e. Sureshkumar Mafatlal Thakkar and Mafatlal Swarupchand Thakkar are father and son, and have good relation with the complainant, who is doing the business to finance in the name and style of "Dhanlaxmi Finance". On 6th June, 1996, the accused No.1 i.e. non-applicant here and the accused No.2, the applicant here, went to the office of the complainant and both of them requested the complainant to advance Rs. 6 lacs. Both of them agreed to repay the advance and, therefore, a cheque, bearing No. 497573 dated 8th June, 1996 of Rs.6 lacs was written by the present applicant drawn on Co-operative Bank Limited, Ahmedabad. The cheque was thereafter signed by accused No.1 Sureshkumar Mafatlal Thakkar, a non-applicant here. Against the cheque, the complainant advanced Rs.6 lacs in cash to both the accused after deducting the amount of discount and the discount voucher was also signed by accused No.1. It is also alleged in the complaint that both the accused gave an understanding and trust that the cheque will be accepted by the bank and money will be received by the complainant. Thereafter, on 8th June 1996, complainant deposited the said cheque with his bank, which in turn, negotiated to the bank of the accused No.1 and returned with an endorsement that the funds were not sufficient. With the complaint, this memorandum which is dated 10th June, 1996 is appended. Thereafter, statutory notices were issued to both the accused and the complaint under Sec. 138 and 142 was filed against them.

3. This petition is filed by original accused No.2 on the ground that the cheque was signed by accused No.1 and he had no concern at all with the transaction. Only allegation against him is that he accompanied with

accused No.1 to the complainant's office and, therefore, on this ground, the complaint is sought to be quashed by original accused No.2 by this petition.

4. Learned Advocate Mr. D.K. Acharya on behalf of the applicant was heard. Mr. Acharya has drawn the attention of the court to Sec.138 of the Negotiable Instruments Act and urged that the cheque is signed by accused No.1 and within the parameter of Sec.138, accused No.2 in whatever manner is not a party either to that dealing or to that cheque, so as to fasten a criminal liability under Sec. 138 of the Negotiable Instruments Act against the present applicant i.e. accused No.2. Learned Advocate Mr. Acharya further urged that the complainant is doing the money lending business, the only allegation against accused No.2 i.e. the present applicant is he was accompanied with the accused No.1. There is no other allegation against accused No.2. In this view of the matter, Mr. Acharya has urged that the accused No.2 is, however, falsely involved in this criminal case and the complaint and the case are required to be quashed against the present applicant i.e. original accused No.2.

4. Learned Metropolitan Magistrate, on receiving the above complaint, which appears to have been filed on 9th June, 1996, after recording the statement of complainant, issued process under Section 138 of the Negotiable Instruments Act against both the accused. As seen from the certified copy of the deposition of the complainant, it appears that the said Criminal Case No. 1541 of 1996 is reached upto the stage of recording of the evidence. On 13th July, 1996, the deposition of complainant is recorded.

5. Learned Advocate Mr.R.C.Shah, on behalf of the respondent No.2 - original complainant has vehemently urged that both the accused together came to the complainant. Both of them requested the complainant for advance of Rs. 6 lacs. Both of them were in the need of money. Even the body of the cheque was written by accused No.2 and cheque was signed by accused No.2 and, therefore, both the accused are equally responsible to answer the criminal complaint under Section 138 of the Negotiable Instruments Act. Further, it was urged that this petition is filed in October 1999 at a belated stage i.e. the complaint is filed in 1996 July, the Criminal case is proceeded to the stage of recording of evidence and the statement i.e. deposition of complainant is already recorded though the cross-examination of the complainant appears to have been deferred. In these

circumstances, the complaint is a belated one and this delay is likely to cause obstruction to legal course of criminal case and, therefore, such petition should not be entertained. Learned advocate Mr. Shah has relied on the decision of the Orissa High Court in the matter of BATA alias BATAKRUSHNA BEHERA vs. ANAMA BEHERA, reported in 1990 Cri.LJ 1110, wherein the High Court of Orissa was pleased to observe that though no limitation is prescribed for filing of an application under Section 482 of the Criminal Procedure Code but the same is required to be filed within reasonable time and in that particular case the High Court of Orissa considered to be period of 90 days a reasonable time for filing of the application. Learned Advocate Mr. Shah has also relied on the decision of the High Court of Himachal Pradesh, in the matter of GOPAL CHAUHAN v. SMT.SATYA, reported in 1979, Cri. L.J. 446, wherein it is observed that the accused of a criminal case was sleeping over his grievances for more than three years and thereafter with the intention to impede the proceedings before the lower court, filed an application under Sec. 482 of the Criminal Procedure Code before the High Court and that in such matter, the High Court should not invoke inherent powers either under Section 482 of the Criminal Procedure Code or under Article 227 of the Constitution of India. It was also further urged by Mr.Shah that the same contentions which are being taken here, can be taken before the trial court because the trial court has proceeded with the matter and has reached upto the stage of recording of the evidence and deposition of the complainant. Therefore, Mr.Shah has urged not to entertain this petition, which will be other wise impediment to the cause of trial before the lower court. Learned Advocate Mr. Shah also urged that both accused are responsible under Sec.138 of the Negotiable Instruments Act as principal and agent. Accused No.1 has signed as agent and the body of the cheque has been written by accused No.2 i.e. principal. On this ground, learned Advocate Mr.Shah has urged to reject this petition.

6. Learned APP Mr. K.P. Raval has supported the argument of Mr. Shah, on behalf of respondent No.2.

7. Having considered carefully the rival contentions raised above, a careful look to Sec.138 of the Negotiable Instruments Act, is absolutely necessary. The transactions, which are exclusively of the civil nature, other wise, have been made a criminal offence by enacting special statute with a special purpose. The purpose behind enacting the statute like Section 138 is to inculcate faith in the efficacy of banking operations and

credibility in transactions of negotiable instruments. For the decision of the present controversy, therefore, the opening word of Section 138 of the Negotiable Instruments Act, will be material to be taken into consideration. The opening words of Section 138 runs thus:

" Where any cheque drawn by a person on an account maintained by him with a banker for payment " .

8. Section 138 of the Negotiable Instruments Act therefore has taken due care to fasten criminal liability on a party, who squarely fall within the first phrase i.e. first opening part of Section 138. Under Sec. 138 only that person can be prosecuted who has drawn cheque on an account maintained by him with the banker for the payment. If this test is applied in the present case it clearly appears that the accused No.2 i.e. present petitioner is not a person, who has drawn a cheque on an account maintained by him with the banker. No liability, therefore, would arise sofar the present petitioner i.e. accused No.2 is concerned. Section 138 of the Negotiable Instruments Act as aforesaid has been enacted for special purposes and therefore it must be strictly interpreted and strictly applied. There is no scope of application of Section 114 of the IPC in prosecution taken in Sec. 138 of the Negotiable Instruments Act. This is so because for the special purpose as aforesaid a criminal liability is fastened by this piece of Legislation to an exclusively civil transactions and therefore, the same is required to be interpreted and applied strictly. So far as accused No.1 is concerned, he might be squarely falling within the mischief of Sec. 138 of the Negotiable Instruments Act because he has signed the cheque and he maintains the account at Bank for which the cheque is drawn. It is immaterial that who wrote in the body of cheque, and for that the accused No.2, cannot be made responsible under Section 138 of the Negotiable Instruments Act. Like wise, merely accompanying with the Accused No.1 to the complainant or even requesting the complainant for the advances of money, would not render accused No.2 liable for prosecution under Sec. 138, which only recognises the person who has drawn the cheque, and person who has drawn the cheque is a person who has signed the cheque and who is maintaining account in his name with the banker. In these circumstances, the accused No.2 under Sec. 138 of the Negotiable Instruments Act is improperly involved in this prosecution.

9. So far as the delay in filing of the petition is concerned, under Section 482 of the Criminal Procedure Code, the High Court has plenary and wide powers. Whether an application or a petition is delayed or is at a belated stage, will have to be decided according to facts and circumstances of the case. No static rule is laid down for that. In this particular case, it clearly appears that accused No.2 has unnecessarily been involved in the case and it prima facie appears that the complaint against him is required to be quashed and in these circumstances, merely because he has filed the petition after three years, this petition cannot be jettisoned. Hence, the aforesaid two decisions cited by learned Advocate Mr. Shah would not have any application to the present case. Like wise, the accused cannot be relegated to the trial when prima facie it appears that he has been improperly implicated in a criminal complaint. Recently, in the case of ASHOK CHATURVEDI vs. SHITUL H. CHANCHANI, reported in AIR 1998 SC 2796, the Apex Court observed that when an accused approaches to the High Court by an application under Section 482 for quashing of the complaint and the complaint, prima facie, appears to be false, then the petitioner cannot be relegated to the trial court on the ground that the accused may take the same stand before the trial court for the discharge. The same observations of the Apex Court is also made in the case of PEPSI FOODS LTD vs. SPECIAL JUDICIAL MAGISTRATE, reported in (1998) 5 SCC 749.

9. In view of the aforesaid discussion, this Misc. Criminal Application is allowed. The Criminal Complaint i.e. Criminal Case No. 1541 of 1996 pending before the learned Metropolitan Magistrate, Ahmedabad, Court No.16, is hereby ordered to be quashed as against the present petitioner i.e. original accused No.2.

10. In the result, the petition succeeds. Rule is made absolute to that extent.

p.n.nair